UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-62195-CIV-COHN/SELTZER

DARREN MICKELL,

Plaintiff,

vs.

BERT BELL/PETE ROZELLE
NFL PLAYERS RETIREMENT PLAN,

Defendant.

_____/

ORDER ON PARTIES' DISPOSITIVE MOTIONS

THIS CAUSE is before the Court upon Defendant's Motion for Judgment on the Administrative Record [DE 52] ("Defendant's Motion") and Plaintiff's Motion for Summary Judgment [DE 53] ("Plaintiff's Motion) (collectively, the "Motions"). The Court has considered the Motions, the parties' briefing on same, the administrative record in this case, and is otherwise advised in the premises. For the reasons set forth below, Defendant's Motion is granted and Plaintiff's Motion is denied.

I. BACKGROUND

Plaintiff Darren Mickell was a defensive lineman in the National Football League ("NFL") from 1992 to 2001. He alleges that he became disabled due to his years of playing professional football and has sought total and permanent disability ("T&P") benefits from Defendant the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the "Plan"). Defendant denied his application for T&P benefits and, by way of this action, Plaintiff now seeks review of that decision under the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq*.

A. The Plan

The Plan provides retirement, disability, and related benefits to eligible NFL Players.[1] AR 6. It is governed by ERISA and the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141, *et seq*. As required by the LMRA, the Plan is jointly administered by employee and employer representatives. 29 U.S.C. § 186(c)(5)(B). The Plan's six-member Retirement Board (the "Board") consists of three members appointed by the NFL Management Council and three members appointed by the NFL Players Association—all of whom are former NFL players. AR 41. The Board is the Plan's "'named fiduciary' within the meaning of ERISA section 402(a)(2) and [it is] responsible for implementing and administering the Plan." Id.

The Plan grants the Board "full and absolute discretion, authority and power to interpret, control, implement, and manage" the Plan, AR 41, including discretionary authority to decide claims for benefits. AR 42, 45. Initially, claims for disability benefits are decided by the Plan's Disability Initial Claims Committee ("Committee"), but Players may appeal Committee decisions to the Board, which reviews and decides claims *de novo*. AR 44, 54.

Under the Plan's "General Standard" for determining total and permanent disability, a Player is entitled to T&P benefits if the Board finds that "he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment." AR 27. The General Standard contains an earned-income exception; it provides that "[a] Player will not be considered to be able to engage in any occupation or employment for remuneration or profit within

[1] Defined by the Plan as including "any person who is or was employed under a contract by an [NFL team] to play football in the [NFL.]" AR 12.

the meaning of this Section 5.2 merely because such person… receives up to $30,000 per year in earned income." Id.

When deciding a Player's application for T&P benefits, the Board may refer a Player for an evaluation with one or more physicians selected by the Plan. AR 28. The Plan refers to these physicians as "Plan Neutral Physicians." AR 49, 50. The Plan provides that "Neutral Physician reports… will be substantial factors" in the Board's decision-making. AR 50.

B. Plaintiff's Application for T&P Benefits

In September 2013, Plaintiff applied for T&P benefits based on a variety of orthopedic impairments. See AR 92 (completed application describing impairments to knees, hips, back, and shoulders). In his application, Plaintiff indicated that he was working full-time as a freight handler. AR 94. The Committee denied his application in light of his employment. AR 113. Plaintiff appealed on March 11, 2014, asserting that he earned "significantly less than the $30,000 per year threshold" and that "[a]s the direct result of injuries sustained while an active member of the [NFL], [he] sustained significant injuries resulting in symptoms, restrictions, and limitations which have prevented him from being able to substantially engage in any occupation or employment for remuneration or profit (up to $30,000.00 per year)." AR 780, 789. In response, the Board's counsel advised Plaintiff's counsel that because Plaintiff's annual income was less than $30,000, his claim would be re-presented to the Committee so that it could consider for the first time whether Plaintiff's impairments met the Plan's requirements for T&P benefits. AR 857.

On June 17, 2014, Plan Neutral orthopedist Dr. Chaim Arlosoroff evaluated Plaintiff. AR 766. The evaluation included a medical history, a physical examination, and radiographic imaging of Plaintiff's spine, shoulders, hips, knees, and ankles. AR 766-71. Dr. Arlosoroff did not, however, review Plaintiff's medical records.[2] Dr. Arlosoroff concluded that Plaintiff is not totally and permanently disabled and "can engage in any type of light to moderate duty work" but "should avoid employment which requires repetitive kneeling, squatting, and/or climbing stairs," "employment which requires climbing ladders or being in unprotected heights," and "positions which require repetitive heavy lifting, especially those above shoulder height." AR 771.

As noted, Plaintiff's counsel provided Defendant with copies of Plaintiff's medical records on June 17, 2014. AR 176. The records included reports from Plaintiff's physiatrist, Dr. Craig Lichtblau, and Plaintiff's psychologist, Dr. Mark Todd. In March 2014, Dr. Lichtblau had conducted a physical examination of Plaintiff, a functional capacity evaluation ("FCE"), an AMA impairment rating assessment, and a records review. AR 184-242. Dr. Litchblau stated that:

> It is my belief that this patient does not have the functional capacity to work 4 hours per day on an uninterrupted basis at this time. He should be in a job setting which allows him to take breaks to change positions from sit-to-stand/stand-to-sit frequently at will for positional comfort. He may sit, stand, and walk as tolerated. He may perform limited bending, limited reaching overhead, limited pushing and pulling. He should avoid kneeling, squatting, climbing unprotected heights, running, and jumping. His estimated physical demand characteristics from the hips-to-overhead position should remain at the light level, which is specifically defined by the Dictionary of Occupational Titles as lifting 20 lbs. infrequently and 10

[2] The parties blame each other for Dr. Arlosoroff's failure to review Plaintiff's medical records. Defendant asserts that Plaintiff's attorneys did not submit the first medical records in support of his application until the day of Dr. Arlosoroff's examination. DE 52 at 6. Plaintiff argues that Defendant mislead him into believing that Defendant had provided Dr. Arlosoroff with Plaintiff's medical records before the evaluation because a May 30, 2014 letter from Defendant to Plaintiff confirming the evaluation stated that "[y]our medical records and application have been sent to the above physician." DE 57 at n.7 (citing AR 162).

> lbs. or less frequently. This patient should always observe appropriate body mechanics which includes, but is not limited to, never bending at his waist while keeping his hips and knees extended.
>
> It should be understood this patient is going to suffer from acute, intermittent exacerbations of chronic pain and discomfort and, when he experiences these acute, intermittent exacerbations of pain and discomfort, he will have good days, bad days, and missed days of work.
>
> It is my medical opinion, as a Board Certified Physiatrist, this patient will be unable to maintain gainful employment in the competitive open labor market or in a sheltered environment with a benevolent employer, secondary to acute, intermittent exacerbations of chronic pain.

AR 204 (emphasis in original).

Dr. Todd had evaluated Plaintiff in April 2014 to assess his neurocognitive status. AR 252-66. Dr. Todd concluded that "[o]verall, [Plaintiff's] neuropsychological profile appears to provide evidence of a mild cognitive disorder." AR 265. Specifically, Dr. Todd explained that Plaintiff "clearly has less than expected memory for visual information as well as problems with rote verbal learning. He may have some slightly less than expected cognitive efficiency with mild slowing and perhaps some mild difficulties with visual perceptual analysis." Id. Dr. Todd also stated that Plaintiff's "mood symptoms are a prominent problem that could contribute to and may even account for his difficulties," and that "[t]he concern would be . . . that his problems may also be more reflective of a significant cognitive disorder related to a potential history of multiple concussive injuries." Ultimately, Dr. Todd concluded:

> [Plaintiff's] mood and behavior together with his physical problems and cognitive difficulties make competitive employment at this point quite difficult. It is recommended that he obtain assistance in trying to reduce some of the effects of these variables, which might make him able to participate in a competitive employment on a more regular basis. Unfortunately, these variables are likely to prohibit him from consistently attending work or completing work requirements.

AR 266.

On August 19, 2014, Plan Neutral neurologist Dr. Barry McCasland evaluated Plaintiff and reviewed certain of his medical records. AR 886-94. Dr. McCasland determined that Plaintiff has a "chronic headache disorder with mild headache burden," a "very mild cognitive impairment," and a "significant depression and anxiety disorder" which either accounts for, or contributes to, Plaintiff's mild cognitive impairment. AR 892. Nevertheless, Dr. McCasland indicated that Plaintiff was not totally and permanently disabled, and that he had "no limits from [a] neurologic standpoint." AR 887.

The next day, Plan Neutral neuropsychologist Dr. Stephen Macciocchi evaluated Plaintiff and reviewed certain of his medical records. AR 896-908. Dr. Macciocchi administered a number of psychological tests but expressed some concern about the reliability and validity of Plaintiff's results, particularly the results of his memory tests. AR 900-01. Dr. Macciocchi noted that:

> While there is self-report evidence Mr. Mickell is experiencing symptoms of major depression, and panic disorder, his MMPI-2RF is difficult to interpret due to symptom over-reporting on validity metrics, which raises concerns about the reliability of any self-report measures that do not have embedded symptom validity scales such as the BDI and BAI. Consequently, even though Mr. Mickell reports numerous clinically suggestive psychological health problems, the severity of his psychological health problems and implications for his ability to engage in competitive employment remains to be determined.

AR 903. Still, Dr. Macciocchi explained that "despite concerns about performance validity during the current assessment, Mr. Mickell did not evidence an abnormal number of low scores." AR 904. Plaintiff showed a decline in his memory test performance since his evaluation four months earlier by Dr. Todd, and Dr. Macciocchi

noted that "his memory test performance declined significantly on story memory tasks, but improved on list learning tasks." Id. Dr. Macciocchi opined that Plaintiff's "decline in story memory over such a brief period of time is most likely due to performance validity problems and/or exacerbation of psychiatric symptomatology." Id. Dr. Macciocchi concluded that:

> Even when considering validity issues, there is no current psychometric evidence Mr. Mickell cannot engage in gainful employment solely from a cognitive perspective. Whether Mr. Mickell's medical problems such as chronic pain or a psychiatric disorder, most likely major depression and panic disorder, would prevent him from working cannot be definitively determined by the current examination. There is clinically suggestive evidence he may have a major depressive disorder and a panic disorder, which could impair his ability to secure and maintain successful employment. Consequently, Mr. Mickell will need formal medical and psychiatric examinations to assess the reliability and significance of his physical/pain disorders and psychiatric condition. If obtained, a psychiatric examination must consider symptom validity and response bias in the context of any self-reported symptoms.

AR 904.

On September 8, 2014, the Committee again denied Plaintiff's application for T&P benefits. AR 916-17. Rather than denying his application solely due to his employment, as they had before, this time the Committee relied upon the conclusions of Dr. Arlosoroff, Dr. McCasland, and Dr. Macciocchi that Plaintiff was not totally and permanently disabled and denied his application on that basis. Id. In March 2015, Plaintiff formally appealed the Committee's decision. AR 934-1173. On appeal, Plaintiff was referred for additional evaluations with three new Plan Neutral Physicians.

On April 14, 2014, Plan Neutral orthopedist Dr. George Canizares evaluated Plaintiff and reviewed certain of his medical records. AR 1252-58. Dr. Canizares opined that Plaintiff suffered from:

1. Cervical DJD early C4-6 with C5-6 central disc herniation and C6-7 central disc herniation.
2. Lumbar broad based disc herniation, L4-5 and L5-S 1.
3. Bilateral shoulder moderate ac joint DJD, status post left shoulder distal clavicle resection with early DJD left shoulder.
4. Right hand fifth digit PIP contracture. Range of motion 30-90 degrees.
5. Right hip anterior labral tear per MRI. No obvious degenerative changes per the x-rays with decreased range of motion.
6. Bilateral knee patellofemoral DJD, moderate.

AR 1258. Dr. Canizares concluded that:

> [U]nder the circumstances, it is my feeling that this gentleman probably can conduct himself in a light duty work capacity. This job would require him to alternate sitting and standing and walk short distances. He can also drive. I do not feel he is able to conduct himself in any capacity beyond that due to his current orthopedic illness[es] which include his neck and back, which have evidence of degenerative herniated disc, shoulders with some early degenerative changes, his right hip with a labral tear, and his bilateral knees with moderate patellofemoral DJD.

Id.

The next day, Plan Neutral neurologist Dr. Peter Dunne evaluated Plaintiff and reviewed certain of his medical records. AR 1224-39. Dr. Dunne noted that Plaintiff's "major problems appear to be orthopedic," but agreed with Dr. Todd that Plaintiff has a "mild cognitive disorder." AR 1226. Dr. Dunne conceded that with respect to Plaintiff's cognitive disorder, "[i]t is hard to tell . . . what is depression and what is possible cognitive damage due to head trauma." Id. Still, Dr. Dunne concluded that "[n]eurologically Mr. Mickle [sic] has no deficits other than absent ankle jerks" and that "[h]e may have mild cognitive problems but they should not impact neurologically his employability." Id. Specifically, Dr. Dunne opined that Plaintiff could engage in sedentary employment that did not involve heavy lifting. AR 1225.

On April 27, 2014, Plan Neutral neuropsychologist Sutapa Ford evaluated Plaintiff, administered a number of psychological tests, and reviewed certain of his medical records. AR 1260-72. Like Dr. Macciocchi, Dr. Ford expressed concern about the validity of Plaintiff's scores. She reported that "Mr. Mickell failed all free-standing and embedded validity scores, performing at levels suggestive of significant exaggeration." AR 1268. While Dr. Ford noted that "this may be due to elevated psychiatric distress and pain," she stated that "the possibility of intentional exaggeration of symptoms cannot be entirely ruled out." Id. Regardless, Dr. Ford explained that:

> Despite poor performance on validity measures, cognitive scores were generally intact to mildly impaired. Comparison of Mr. Mickell's test scores to the August 2014 scores revealed consistency in performance across time. Mr. Mickell displayed mild fluctuations in test performance which is expected as part of normal variance in clinical scores. It is also common as his performance is likely influenced by psychiatric dysfunction, poor effort, pain or some combination thereof. Psychological testing revealed major depression and significant anxiety with evidence of symptom exaggeration.
>
> From a neurocognitive standpoint, there is insufficient evidence supporting the notion that Mr. Mickell is incapable of full-time employment as his scores are generally intact or mildly diminished. More significant to his functional capacity is psychiatric dysfunction, and it is therefore recommended that Mr. Mickell undergo a thorough psychiatric assessment which includes validity testing and formal assessment of response biases. Mr. Mickell's self-reported cognitive complaints are likely secondary to other factors, rather than neurological dysfunction, and may therefore improve with targeted treatment.

Id.

At its quarterly meeting on May 14, 2015, the Board reviewed Plaintiff's appeal and decided to refer Plaintiff to a Plan Neutral psychiatrist. AR 1324. Before that evaluation occurred, Plaintiff was evaluated by a psychologist of his own choosing, Peggy Vermont, on June 10, 2015. AR 1330-42. Ms. Vermont reported that "it appears

that Mr. Mickell is suffering from significant mental health symptoms that are impeding his social, emotional, and occupational functioning" and that "[d]ue to the severity of his mood and anxiety symptoms, Mr. Mickell is not deemed employable at this time." AR 1341.

On July 7, 2015, Plan Neutral psychiatrist Dr. Raymond Faber evaluated Plaintiff. AR 1346-51. Dr. Faber explained that "[b]ecause [Plaintiff] had had extensive neuropsychological testing, [he] saw no need to formally assess his cognition given his vocabulary and cogent thought." AR 1351. Dr. Faber diagnosed Plaintiff with "[d]epression and anxiety not otherwise specified," but stated that he did not consider Plaintiff's psychological difficulties "to rise to a level that precludes some kind of employment," such as "assist[ing] in sports program[s] for youths." AR 1347, 1351.

On July 29, 2015, Plaintiff was evaluated by another psychologist of his own choosing, Rosa Gonzalez, who diagnosed him with depression and anxiety and opined that as a result of his cognitive and emotional impairments, he "is unable to engage in any occupation." AR 1358-59. Still, Ms. Gonzalez explained that "[w]ith medication and regular therapy [Plaintiff] should be able to cope with his anxiety and depression to the point where he can attempt to return to work." AR 1359.

On August 19, 2015, the Board reviewed all of the materials referenced above and the arguments submitted by Plaintiff's counsel and unanimously denied his application for T&P benefits. AR 1365-67; 1370-74. Specifically, the Board explained to Plaintiff that:

> After considering all of the record evidence, the Retirement Board determined that there is substantial evidence to conclude that you are not totally and permanently disabled within the meaning of Section 5.2(a) of the Plan. The Retirement Board based this conclusion primarily upon the

> reports of the Plan's seven (7) neutral physicians, all of whom found that you are not totally and permanently disabled by your orthopedic, neurological, cognitive, and/or psychiatric impairments. For this reason, the Retirement Board denied your appeal.
>
> The Retirement Board reached its decision despite the presence of potentially conflicting medical evidence in the record. As noted above, Sections 8.2 and 8.9 of the Plan give the Retirement Board "full and absolute discretion" to determine the relative weight to give information in the administrative record. The Retirement Board noted that some of the evidence you submitted indicated you have certain impairments but did not directly address whether you are totally and permanently disabled (i.e., unemployable) due to those impairments. The Retirement Board considered such evidence, but placed less weight on it compared to other evidence that did directly address the issue of whether you are able to work. As for the evidence that did squarely address the issue, the Retirement Board had more confidence in the reports of the Plan's neutral physicians. The Plan's neutral physicians are instructed to evaluate Players fairly, without bias for or against the Player, and they typically have experience evaluating Players and other professional athletes. (For these reasons, the reports from the Plan's neutral physicians are uniformly accepted and relied upon by both the members of the Retirement Board appointed by the NFL and those appointed by the NFL Players Association.) Here, the Retirement Board also noted that none of the Plan's neutral physicians found you to be totally and permanently disabled, and given this unanimity of opinion the Retirement Board credited the conclusions of its neutral physicians over any contrary evidence.

AR 1373.

C. Procedural History

On October 16, 2015, Plaintiff filed his Complaint seeking review, under ERISA, of Defendant's denial of T&P benefits, and attorneys' fees. DE 1. On April 7, 2016, the parties jointly moved to stay this case. DE 21. As grounds, the parties explained that Plaintiff was "awaiting an imminent determination by the Social Security Administration as to his eligibility for Social Security Income (SSI) benefits" and that "[s]hould Plaintiff receive a favorable disability determination by the Social Security Administration, the parties agree that this would be dispositive of a material aspect of the claims asserted

by Plaintiff in this litigation." Id. ¶¶ 1-2. The Court granted the parties' motion to stay but required the parties to file periodic status reports on Plaintiff's claim for SSI benefits. DE 22. Plaintiff's claim for SSI benefits dragged on for approximately a year and a half. On November 20, 2017, Plaintiff filed a status report informing the Court that the Social Security Administration had recently issued a determination that Plaintiff is disabled under section 1614(a)(3)(A) of the Social Security Act. See DE 34-1 (the "SSA Award"). The Court then ordered the parties to participate in a second mediation, DE 42, but after the parties were unable to reach a settlement, DE 46, the Court lifted the stay on August 29, 2018. DE 47. The parties then filed their respective Motions on November 19, 2018. DE 52, 53.

D. Dispositive Motions

In his Motion, Plaintiff first argues that his SSA Award is dispositive of his right to T&P disability benefits. DE 53 at 4-5. Plaintiff also argues that Defendant's denial of T&P benefits was wrong and arbitrary and capricious. Id. at 5-31. As grounds, Plaintiff asserts that: (1) Defendant applied a more stringent standard for disability than contained in the Plan, (2) all seven Plan Neutral Physician evaluations were "fundamentally flawed and incomplete," (3) Defendant improperly "cherry-picked" the reports of the Plan Neutral Physicians to support its decision, and (4) Defendant arbitrarily refused to credit the medical and psychological reports submitted by Plaintiff. See id.

In its Motion, Defendant argues that the SSA Award is not dispositive of Plaintiff's right to T&P disability benefits and that the Board considered all of the evidence but, in

its discretion, reasonably decided to accept the unanimous conclusion of the seven Plan Neutral Physicians that Plaintiff is not totally and permanently disabled. See DE 52.

II. STANDARD OF REVIEW

As noted above, Plaintiff calls his Motion a "Dispositive Motion for Summary Judgment," DE 52, while Defendant calls its Motion a "Motion for Judgment on the Administrative Records." DE 53. The Eleventh Circuit has "recognized [that] the motion that serves 'as [a] vehicle[ ] for resolving conclusively' an ERISA benefits-denial actions is not a typical motion for summary judgment." Prelutsky v. Greater Georgia Life Ins. Co., 692 Fed. Appx. 969, 972 n.4 (11th Cir. 2017) (quoting Blankenship v. Metro. Life Ins. Co., 644 F.3d 1350, 1354 n.4 (11th Cir. 2011) (per curiam)). Rather, "[u]nlike the usual summary-judgment standard, the district court in the ERISA context 'does not take evidence, but, rather, evaluates the reasonableness of an administrative determination in light of the record compiled before the plan fiduciary.'" Id. (quoting Leahy v. Raytheon Co., 315 F.3d 11, 17-18 (1st Cir. 2002)). See also Reid v. Metro. Life Ins. Co., 944 F. Supp. 2d 1279, 1302 (N.D. Ga. 2013) (citing Curran v. Kemper Nat. Servs., Inc., No. 04–14097, 2005 WL 894840, at *7 (11th Cir. Mar. 16, 2005)) ("In an ERISA benefits denial case the district court acts more as an appellate court than as a trial court."). Thus, the Court will not apply the usual summary judgment standard here. See Leahy, 315 F.3d at 17 (quoted with approval in Blankenship, 644 F.3d at 1354 n.4) (discussing the "obvious discongruence" between the usual summary judgment standard and the arbitrary and capricious standard for ERISA cases).

The Eleventh Circuit has established a multi-step framework for Courts to apply in reviewing an ERISA plan administrator's benefits decision. Blankenship, 644 F.3d at

1355. Here, however, because the Board has full discretionary authority and no conflict of interest, the arbitrary and capricious standard of review applies, and the dispositive question is whether the Board's decision was reasonable. See Prelutsky, 692 Fed. Appx. at 973 ("even assuming that GGL's decision was '*de novo* wrong,' as the district court found, the dispositive question is whether GGL's decision was arbitrary and capricious.").

"When conducting a review of an ERISA benefits denial under an arbitrary and capricious standard (sometimes used interchangeably with an abuse of discretion standard), the function of the court is to determine whether there was a reasonable basis for the decision, based upon the facts as known to the administrator at the time the decision was made." Glazer v. Reliance Standard Life Ins. Co., 514 F.3d 1241, 1246 (11th Cir. 2008). If there is a reasonable basis, the decision "must be upheld as not being arbitrary or capricious, even if there is evidence that would support a contrary decision," White v. The Coca–Cola Co., 542 F.3d 848, 856 (11th Cir. 2008), or "[if] the court or anyone else might reach a different conclusion." Turner v. Delta Family–Care Disability and Survivorship Plan, 291 F.3d 1270, 1274 (11th Cir. 2002). The administrator's decision "need not be the best possible decision, only one with a rational justification." Griffis v. Delta Family-Care Disability, 723 F.2d 822, 825 (11th Cir. 1984).

III. ANALYSIS

A. The SSA Award Does Not Entitle Plaintiff to T&P Benefits

Plaintiff argues that his SSA Award is dispositive of his entitlement to T&P benefits based on: (1) Section 5.2(b) of the Plan and (2) Defendant's assertion to the Court in the parties' Joint Motion to Stay Proceedings that the SSA Award would be

"dispositive of a material aspect of the claims" in this case. DE 53 at 4-5. Section 5.2(b) of the Plan provides in relevant part that:

> An Eligible Player who is not receiving monthly pension benefits under Article 4 or 4A, who has been determined by the Social Security Administration to be eligible for disability benefits under either the Social Security disability insurance program or Supplemental Security Income program, and who is still receiving such benefits at the time he applies, will be deemed to be totally and permanently disabled, unless four voting members of the Retirement Board determine that such Player is receiving such benefits fraudulently and is not totally and permanently disabled.

AR 27.

Defendant argues that the SSA Award should not factor into the Court's analysis because it was generated over two years after the Board's final determination and is therefore not part of the administrative record. DE 52 at 19-20. Defendant explains that the SSA Award "was submitted to and treated as a new application under an entirely separate plan—the NFL Player Disability & Neurocognitive Benefit Plan ("Disability Plan")—***not*** the Retirement Plan." Id. at 20 (emphasis in original). The Disability Plan is not a party to this case. Based on the SSA Award, Plaintiff was found to be automatically entitled to "Inactive B" T&P benefits under the Disability Plan (he seeks more lucrative "Inactive A" benefits from Defendant). See DE 52-10. Defendant also argues that because Plaintiff did not seek further administrative review of the Disability Plan's decision and the time has elapsed for him to do so, he has failed to exhaust his administrative remedies and is therefore barred from seeking greater or additional benefits premised on the SSA Award. DE 52 at 20. Plaintiff does not respond at all to these arguments in his Response to Defendant's Motion or in his Reply.

The Court is troubled by Defendant's inconsistent positions with respect to the SSA Award. Defendant offers no explanation whatsoever for why, in April 2016, it

represented to the Court that the SSA Award would be "dispositive of a material aspect of the claims" in this case and then less than two-and-a-half years later claimed that the SSA Award was "not even relevant." DE 48 at 3. If the SSA Award is not relevant now, Plaintiff's claim for SSI benefits was never relevant to this litigation and was certainly no reason to delay this case for two-and-a-half years.

But while Plaintiff cites to Defendant's prior representation regarding the SSA Award in his Motion, DE 52 at 4-5, he fails to advance an estoppel argument. Even had he made such an argument, however, the Court would not accept it under the circumstances. That is because all that Defendant gained by representing to the Court that the SSA Award would be relevant was a temporary stay of the case—an outcome that Plaintiff jointly requested. See New Hampshire v. Maine, 532 U.S. 742, 750 (2001) (explaining that "judicial estoppel is an equitable doctrine invoked at a court's discretion" and that courts have inquired as to "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.") (internal quotation marks and citations omitted).

Ultimately, despite concerns about Defendant's inconsistent positions with respect to the SSA Award, the Court agrees with Defendant that the SSA Award is not properly considered given that it is outside the administrative record and because of Plaintiff's failure to exhaust his administrative remedies with respect to the Disability Plan's treatment of the SSA Award. See, e.g., Blankenship, 644 F.3d at 1354 ("Review of the plan administrator's denial of benefits is limited to consideration of the material available to the administrator at the time it made its decision."); Springer v. Wal-Mart Associates' Grp. Health Plan, 908 F.2d 897, 899 (11th Cir. 1990) ("It is well-established

law in this Circuit that plaintiffs in ERISA cases must normally exhaust available administrative remedies under their ERISA-governed plans before they may bring suit in federal court.").

B. Defendant and the Plan Neutral Physicians Properly Applied the Plan

Plaintiff asserts that Defendant and all of the Plan Neutral Physicians "applied a more stringent standard for T&P disability than provided in the Plan." DE 53 at 17 n.8. Rather than considering whether Plaintiff has "the ability to work in any occupation for remuneration or profit," Plaintiff argues that the proper inquiry is whether Plaintiff "is unable to work in an occupation ***in which he could earn at least $30,000 per year***." Id. at 17 (emphasis added). As noted above, the Plan provides under its "General Standard" for "Determination of Total and Permanent Disability" that a Player is entitled to T&P benefits if the Board finds: "(1) that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit," and "(2) that such condition is permanent." AR-27. Later in this same section, the Plan states that: "[a] Player will not be considered to be able to engage in any occupation or employment for remuneration or profit within the meaning of this Section 5.2 merely because such person… receives up to $30,000 per year in earned income." Id.

Defendant argues that the Plan does not define disability by whether a Player is capable of working in a job that earns him more than $30,000 per year. DE 55 at 9-10. According to Defendant, its disability standard based on the ability to engage in "any occupation or employment for remuneration or profit" is "a fairly typical . . . disability standard." DE 55 at 9. The $30,000 exception, Defendant explains, "accommodates

many Players who, after retiring from professional football, earn modest income from signing autographs, for example." Id. at 10 (further explaining that "[a] Player who earns less than $30,000 by signing autographs would not be automatically disqualified from applying for and receiving T&P benefits. If the medical evidence showed that he was capable of employment, however, he would not be eligible for T&P benefits under the 'any occupation' standard."). Defendant notes that its interpretation of Plan provisions is entitled to a high degree of deference. Id. (quoting Blankenship, 644 F.3d at 1355 n.6.).

The Court finds that the only reasonable interpretation of the Plan's disability standard is the interpretation advanced by Defendant. See Luton v. Prudential Ins. Co. of Am., 88 F. Supp. 2d 1364, 1370-71 (S.D. Fla. 2000) ("When construing the terms of an ERISA policy, ambiguity exists if the policy is susceptible to two or more reasonable interpretations that can fairly be made . . . Under ordinary principles of contract interpretation, the court must first examine the natural and plain meaning of the plan's language"). The plain language of the Plan clearly does not require the Board to determine whether a Player is capable of working in a job that earns him more than $30,000 per year. Rather, the disability standard is unambiguously based on the ability to engage in ***any*** paid employment. The $30,000 exception plainly does not alter that general standard, but merely provides that a Player will not automatically be precluded from satisfying it simply because he receives up to $30,000 per year in income.

While the Plan's plain language is unambiguous and dispositive of the issue, even if it were ambiguous, Defendant's interpretation is undoubtedly reasonable. It is not difficult to imagine the practical problems that would arise in applying Plaintiff's interpretation of the Plan's disability standard. Not only would the Board likely need to

weigh the expert opinions of physicians regarding a Player's physical and/or mental health, it would need to attempt to determine how a Player's physical and/or mental limitations would impact his ability to engage in specific occupations that pay above the $30,000 threshold (as well as presumably take into account regional pay differences).[3]

C. Defendant's Denial of T&P Benefits was not Arbitrary and Capricious

The Court finally turns to consider whether there is a reasonable basis in the administrative record for Defendant's determination that Plaintiff is not totally and permanently disabled. Given that the administrative record includes the comprehensive reports of ***seven*** Plan Neutral Physicians (including two orthopedists, two neurologists, two neuropsychologists, and one psychiatrist) that evaluated Plaintiff and ***unanimously*** concluded that he was capable of employment, it is clear that Defendant's decision to deny T&P benefits was not arbitrary and capricious. See, e.g., Boyd v. Bert Bell/Pete Rozelle NFL Players Ret. Plan, 410 F.3d 1173, 1179 (9th Cir. 2005) ("even a single persuasive medical opinion may constitute substantial evidence upon which a plan administrator may rely in adjudicating a claim."). Plaintiff's arguments to the contrary lack merit.

Plaintiff begins by arguing that Defendant's decision was wrong because of the record evidence showing that "during his career with the NFL, [Plaintiff] suffered multiple, severe injuries to most of his body, leaving him in chronic and debilitating pain." DE 53 at 5. Plaintiff points to the medical records he submitted in support of his

[3] Plaintiff also argues that the fact that Defendant reopened Plaintiff's claim—after initially denying it based on his admitted employment—when presented with evidence that Plaintiff was unable to earn up to $30,000 annually in his employment cuts against Defendant's interpretation. DE 59 at 11 n. 14. It does appear that, given Plaintiff's employment at the time of his application, Defendant was not required to reopen Plaintiff's claim merely because his annual income was less than $30,000. But although Defendant may have gratuitously done so, what matters is that when it did, it applied the correct disability standard in reaching its final determination.

application for T&P benefits as well as the reports submitted by both his physicians and the Plan Neutral Physicians. See, e.g., id. at 17 ("the majority of the evaluators hired by the Plan found clinical and objective evidence that [Plaintiff] suffers from cognitive deficiencies and severe psychological impairments."). But as Defendant correctly notes, the question is not whether Plaintiff has presented evidence that he has been diagnosed with certain impairments or even whether Plaintiff has presented evidence that could conceivably constitute a reasonable basis for finding him disabled. See, e.g., Sanzone v. Hartford Life & Acc. Ins. Co., 2008 WL 80984, at *11 (S.D. Fla. Jan. 3, 2008) ("whether Plaintiff is 'disabled' under the policy is not based on whether she has been diagnosed with a certain medical condition."); Crume v. Metro. Life Ins. Co., 417 F. Supp. 2d 1258, 1273 (M.D. Fla. 2006) ("[T]he pertinent question is not whether the claimant is truly disabled, but whether there is a reasonable basis in the record to support the administrator's decision on that point."). Thus, the Court assumes that Plaintiff's evidence could have supported a determination that he is disabled—as it did with respect to his claim for SSI benefits—but must confine its analysis to whether Defendant's decision to the contrary was reasonable.

As noted above, in attempting to establish that there was no reasonable basis in the record for Defendant's decision to deny T&P benefits, Defendant primarily argues that all seven Plan Neutral Physician evaluations were "fundamentally flawed and incomplete" and that Defendant arbitrarily refused to credit the medical and psychological reports submitted by Plaintiff. The Court will first address the various criticisms that Plaintiff lodges against the Plan Neutral Physicians.

First, with respect to Dr. Arlosoroff, Plaintiff argues that "[t]he fact that [Dr.] Arosoroff [sic] was not given any records to review renders his opinions incomplete and inherently unreliable." DE 53 at 17. Not so. Plaintiff cites no authority remotely suggesting that a physician's opinion based on a personal examination, medical history, and radiographic imaging cannot constitute a reasonable basis for a plan administrator's decision merely because of the physician's failure to review medical records.

Second, Plaintiff argues that all of the Plan Neutral Physicians "unreasonably assessed each of [Plaintiff's] conditions in a silo, failing to consider the cumulative effect of his physical, cognitive, and psychological symptoms on his functionality." Id. at 27. For example, Plaintiff faults Dr. McCasland, a neurologist, for confining his opinion to whether Plaintiff is able to work "from [a] neurologic standpoint." Id. at 17 (citing AR 887). The Court agrees with Defendant that the fact that the Plan Neutral Physicians limited their conclusions to areas within their expertise actually supports the reliability of their reports. And while Dr. Todd, Plaintiff's psychologist, opined on the combined effects of Plaintiff's psychological, physical, and cognitive impairments, it is unclear what qualified him to do so.

Plaintiff relies heavily on Maiden v. Aetna Life Ins. Co., 2016 WL 81489 (N.D. Ind. Jan. 6, 2016), but the Court finds Maiden unpersuasive and distinguishable. True, the Maiden court did fault the administrator for failing to "review[ ] the compound effect of Maiden's physical impairments and his psychiatric issues." Id. at * 6. But the court appeared most troubled by the fact that the administrator disregarded the opinions of the plaintiff's "primary care physician . . . therapist . . . pain management specialist . . . neurologist . . . surgeon . . . and [ ] psychiatrist" in favor of two of its physicians who

merely conducted file reviews. Id. at * 7 ("[e]ven within the silos of physical versus psychological disabilities, Aetna's review of Maiden's file is troubling."). Here, unlike in Maiden, the seven Plan Neutral Physicians actually evaluated Plaintiff and there is no indication that any of them, much less all seven of them, "failed to consider relevant aspects of [Plaintiff's] medical condition." Id.

Third, Plaintiff claims that the Plan Neutral Physicians "who were tasked with assessing [Plaintiff's] physical functional abilities came to drastically different conclusions" and that Defendant's failure to resolve these conflicts was unreasonable. DE 53 at 26. For instance, Plaintiff contrasts Dr. Canizares' opinion that Plaintiff could "conduct himself in a light duty work capacity" with Dr. Dunne's opinion that Plaintiff could only engage in sedentary employment. Id. at 30. Plaintiff further argues that Defendant's failure to resolve these allegedly conflicting opinions is especially unreasonable given Dr. Litchblau's FCE findings, which, according to Plaintiff, "resolve[s] the conflicts" and is the "the only objective testing of [Plaintiff's] functional ability." Id. at 16, 26.

The Court does not find that any arguable inconsistencies between the reports of the Plan Neutral Physicians rise to a level that would call the reliability of the reports into question. Not only do the seven Plan Neutral Physicians unanimously agree on the ultimate issue of Plaintiff's ability to work, but their specific conclusions do not significantly conflict. Consider the reports of the two Plan Neutral orthopedists: Dr. Arlosoroff opined that Plaintiff could "engage in any type of light to moderate duty work" and Dr. Canizares opined that Plaintiff could conduct himself in a "light duty work capacity." The fact that Dr. Dunne, a neurologist, opined that Plaintiff could engage in

sedentary employment that did not involve heavy lifting does not call into question the reliability of the opinions of any of the Plan Neutral Physicians. Nor does Defendant's failure to replicate Dr. Litchblau's FCE.

Plaintiff asserts that Dr. Litchblau's FCE provides "*unrefuted*, objective evidence of [Plaintiff's] functionality and inability to maintain gainful employment," DE 53 at 26 (emphasis in original), and that courts have recognized that FCEs are "the best means of assessing an individual's functional level." Id. (citing Lake v. Hartford Life & Acc. Ins. Co., 320 F. Supp. 2d 1240, 1246 (M.D. Fla. 2004)). But contrary to Plaintiff's claims, Dr. Litchblau's FCE is not unrefuted—it was refuted by Dr. Canizares, who reviewed the FCE and necessarily rejected its conclusions when he found Plaintiff capable of employment. AR 1257-58. Plaintiff cites Madison v. Greater Georgia Life Ins. Co., 225 F. Supp. 3d 1381 (N.D. Ga. 2016) in support of his argument that Defendant's "fail[ure] to consider, dispute, or replicate [the FCE] establishes arbitrary and capricious decision making." But comparing the facts of Madison to the facts of this case illustrates precisely why Defendant's decision was ***not*** arbitrary and capricious.

In Madison, the administrator based its decision to deny long-term disability ("LTD") benefits solely on the opinions of record reviewers, none of whom ever examined the plaintiff. Id. at 1394. As in this case, the plaintiff in Madison had obtained an FCE. See id. But two of the administrator's three record reviewers "had no chance to consider the FCE, and [Dr. William] Andrews, the only reviewer who had access to it, never mentioned the FCE in his report." Id. at 1394. Instead, the court found that Dr. Andrews "inexplicably focused almost entirely" on the only exam of the plaintiff that "showed no objective measurements of left knee deficiencies," despite "fifteen other

visits that showed at least some deficiency." Id. at 1394, 96-97. The Madison court ultimately held that "[s]uch a selective review of the evidence and reliance on a cold record file review by a non-examining doctor, to the exclusion of plainly relevant and reliable clinical evidence like Madison's FCE, establishes that [GGL's] decision was not made 'rationally and in good faith' and is therefore unreasonable." Id. at 1400 (internal quotations omitted). In stark contrast to Madison, Defendant's failure in this case to replicate or directly dispute the FCE does not render its decision arbitrary and capricious given that Defendant did not rely on the "selective review of the evidence" by non-examining doctors, but on the unanimous opinion of physicians that personally examined Plaintiff and necessarily rejected the conclusions of the Plaintiff's FCE.

Plaintiff raises several other criticisms of the Plan Neutral Physicians. For instance, he argues that their examinations were not sufficiently thorough and that they failed to conduct certain assessments that they should have. See, e.g., DE 53 at 17 ("Arlosoroff's 'examination' of Mr. Mickell lasted only a few minutes . . ."), id. at 23 ("Defendant failed to request and [Dr.] Faber failed to perform any mental status testing, a comprehensive psychological assessment . . . validity testing, or a formal assessment of response biases."). But the Court agrees with Defendant that these complaints "are not the type irregularities that create 'procedural unreasonableness' sufficient to recast [Defendant's] reliance upon the consulting professionals' opinions as being arbitrary and capricious." Howard v. Hartford Life & Acc. Ins. Co., 929 F. Supp. 2d 1264, 1297 (M.D. Fla. 2013).

Lastly, Plaintiff argues that Defendant arbitrarily refused to credit the medical and psychological reports submitted by Plaintiff. See, e.g., DE 53 at 25-26 (quoting Black &

Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003)) ("plan administrators '***may not arbitrarily refuse to credit a claimant's credible evidence***.'") (emphasis in original). Of course, Defendant points to the next sentence of the Supreme Court's Nord decision, which states: "[b]ut, we hold, courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation." Nord, 538 U.S. at 834. Here, Defendant reasonably credited the unanimous opinion of the seven Plan Neutral Physicians over the conflicting evidence that Plaintiff submitted. And as noted above, Plaintiff has failed to show that any, much less all, of the Plan Neutral Physician's reports are unreliable. Moreover, the Plan expressly gives the Board "full and absolute discretion, authority and power" to weigh evidence and determine benefits claims and states that "Neutral Physician reports . . . will be substantial factors" in the Board's decision-making. AR 41-42, 45, 50.

In sum, Defendant did not "simply ignore[ ] relevant medical evidence in order to arrive at the conclusion it desired," it "denied [Plaintiff's] claim . . . on the basis of conflicting, reliable evidence—a practice [the Eleventh Circuit] ha[s] upheld." Oliver v. Coca Cola Co., 497 F.3d 1181, 1199 (11th Cir. 2007), reh'g granted, opinion vacated in part, 506 F.3d 1316 (11th Cir. 2007), and adhered to in part on reh'g sub nom. Oliver v. Coca-Cola Co., 546 F.3d 1353 (11th Cir. 2008).

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED** and **ADJUDGED** as follows:

1. Plaintiff's Motion for Summary Judgment [DE 53] is **DENIED**.

2. Defendant's Motion for Judgment on the Administrative Record [DE 52] is **GRANTED**.

3. The Court will enter a separate Final Judgment consistent with this Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 15th day of January, 2019.

Copies provided to counsel of record via CM/ECF